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In The

Supreme Court of the United States

October Term, 1966

No. 659

STATE OF WISCONSIN,

Petitioner,

v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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v.

MILWAUKEE BRAVES, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Attorney General of Wisconsin, on behalf of the State of Wisconsin, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in the above-entitled case.[1]

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[1] Respondents are the National League of Professional Baseball Clubs, Chicago National League Ball Club, Inc., Cincinnati Reds, Inc., Los Angeles Dodgers, Inc., Houston Sports Association, Inc., Metropolitan Baseball Club, Inc., Philadelphia National League Club, Pittsburgh Athletic Company, Inc., National Exhibition Company, Milwaukee Braves, Inc., and St. Louis National Baseball Club, Inc.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin on removal (R. 2116; App. 269d)[2] is not officially reported. It is unofficially reported at 1965 CCH Trade Cases ¶ 71,597. The memorandum opinions of the Wisconsin Circuit Court (R. 2151, 2195; App. 204c and 54b) are not officially reported. They are unofficially reported at 1966 CCH Trade Cases ¶ 71,666 and ¶ 71,738. The opinion of the Supreme Court of Wisconsin (R. 9467; App. 2a) is officially reported at 31 Wis. 2d 699 and is unofficially reported at 144 N.W.2d 1 and 1966 CCH Trade Cases ¶ 71,843.

JURISDICTION

The judgment of the Supreme Court of Wisconsin (R. 9466; App. 281f) was entered on July 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The Supreme Court of Wisconsin concluded from the facts as found by the Circuit Court that respondents' refusal to deal with qualified applicants for a franchise to continue major league baseball in Milwaukee was an unlawful boycott and an act of monopolization which would violate the Wisconsin antitrust law if that law could be applied. It held, however, that enforcement of the Wisconsin law was barred on federal constitutional grounds. The questions presented are:

1. Whether non-coverage of a business by the federal antitrust laws constitutionally pre-empts state antitrust law when this Court has held that coverage of a

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[2] References to "R. ——" are to the certified record. References to "App. ——" are to the separate Appendix to this petition. References to "Ex. ——" are to exhibits filed with the Circuit Court, which are part of the record in the court below, and in this Court.

business by the federal antitrust laws does not pre-empt state antitrust law.

2. Whether this Court's decisions in *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), holding that the federal antitrust laws do not apply to organized baseball, and the subsequent inaction of Congress, evidence a "national policy" which constitutionally bars application of state antitrust laws to organized baseball.

3. Whether the Commerce Clause bars application of a state's antitrust law to a business with interstate aspects because of the mere possibility of future conflict with the laws of other states.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statute involved are the Commerce and Supremacy Clauses of the United States Constitution, and §§ 133.01, 133.02, Wisconsin Statutes.

Commerce Clause, U.S. Const., art. I, sec. 8, clause 3:

> "The Congress shall have Power
>
> * * *
>
> To regulate Commerce . . . among the several States . . . ."

Supremacy Clause, U.S. Const., art. VI, clause 3:

> "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ."

Section 133.01, Wis. Stat. (1965):

> "133.01 UNLAWFUL CONTRACTS; CONSPIRACIES. (1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is

hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000 . . . ."

Section 133.02, Wis. Stat. (1965):

"133.02 INJUNCTION; PLEADING; PRACTICE. The several circuit courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof. The several district attorneys shall, upon the advice of the attorney general, who may appear as counsel in any such case, institute such actions or proceedings by complaint or information as in ordinary actions and a private party by complaint may institute actions or proceedings as shall be deemed necessary to prevent or restrain a violation of s. 133.01, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing, shall be enjoined or otherwise prohibited. When the parties informed against or complained of have been served with a copy of the information or complaint and cited to answer the same the court shall

proceed, as soon as may be in accordance with its rules, to the hearing and determination of the case; and pending the filing of the answer to such information or complaint may, at any time, upon proper notice, make such temporary restraining order or prohibition as is just . . . ."

STATEMENT

The Circuit Court of Milwaukee County found that the respondents' refusal to deal with qualified applicants for a franchise to continue major league baseball in Milwaukee was an unlawful boycott and an act of monopolization in violation of Wisconsin's antitrust law. (R. 2466-67; App. 199b-200b). The Supreme Court of Wisconsin, in a 4 to 3 decision, reversed the Circuit Court solely on the ground that the Commerce and Supremacy Clauses of the United States Constitution precluded application of Wisconsin's law. (R. 9467; App. 2a).

The State's action was commenced in the Circuit Court on August 6, 1965, against Milwaukee Braves, Inc. (the "Braves") and the nine other corporations comprising the National League of Professional Baseball Clubs (the "National League") and the League itself. (R. 2). Respondents removed the case to the United States District Court for the Eastern District of Wisconsin on August 26, 1965, and in their removal petition, first raised the constitutional questions decided by the court below. They asserted (R. 58):

> "The United States has adopted a national policy, binding upon the several States, that the conduct or exhibition of baseball games and incidents thereto by the defendants is not trade or commerce, and that the practices of the defendants sought to be placed in issue by the complaint herein are lawful. It is beyond the constitutional power of the State of Wisconsin to declare otherwise, or to enact or to enforce any law, or to interfere with, or to impede the rights federally guaranteed to petitioners to conduct as lawful enter-

prises the businesses alleged in the complaint in the said action in the Circuit Court."

On November 9, 1965, the federal district court remanded the case to the Circuit Court (R. 2116; App. 269d) where respondents renewed substantially the same constitutional defenses by demurrers (R. 108, 114), and after the demurrers were overruled (R. 2151; App. 204c), by answer. (R. 120, 131).

On April 13, 1966, the Circuit Court announced its decision. The facts, principally as found by the Circuit Court, are as follows:

Milwaukee is a good baseball market. (R. 2464; App. 198b). The Braves played major league baseball in Milwaukee County Stadium from 1953 to 1965 and drew 19 million fans. The average annual attendance in Milwaukee for the entire 13-year period was second highest of all of the teams in the major leagues. This was 31 percent higher than the average for the National League and 52 percent higher than the average for the American League. (R. 2463-64; App. 197b-198b).[3] Between 1953 and 1965, the Braves' owners realized pre-tax profits and capital gains aggregating approximately 13 million dollars. (R. 2462; App. 196b-197b). The Circuit Court found that "Milwaukee has the ability to reasonably support a Major League Team." (R. 2464; App. 198b).

In the fall of 1962, the Braves' franchise and its player contracts were purchased by a Chicago syndicate.

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[3] The Braves never drew fewer than 1,100,000 until 1962, which was their low year, drawing 766,921. In 1963, attendance rose to 773,018 and in 1964 to 910,911, despite the fact that the Braves were not pennant contenders and the air was filled with rumors of the impending move. (R. 2389-90, 2401, 2464; App. 133b, 143b, 198b). The 1965 attendance of 555,584 reflected the bitterness of the fans over the move to Atlanta, which had been announced in the fall of 1964. (R. 2401, 2411; App. 143b, 152b).

(R. 2462; App. 196b, Ex. 13). The new owners paid over six million dollars for assets which were valued on the former owners' books at $322,000. They immediately began to court offers from other communities to move the franchise. (R. 2377; App. 122b). Informal, but firm arrangements were made to move to Atlanta in the spring of 1964. (R. 2379; App. 124b-125b). The decision of the Braves to move was made in secret and deceitfully denied, thus misleading the consuming public. The dissenting opinion of the Supreme Court of Wisconsin stated in part (R. 9506; App. 52a):

> "The record is rife with evidence that the corporation acted surreptitiously and deceitfully in an effort to prevent a timely exercise of Wisconsin's jurisdiction."

Although the Braves' operation had always been profitable (R. 2462; App. 196b-197b), and remained so in 1963 and 1964 (R. 2463; App. 197b), in October 1964 the Braves formally sought permission from the National League to transfer its franchise to Atlanta, Georgia. (R. 2387; App. 131b). On November 7, 1964, the National League unanimously approved the application to be effective beginning with the 1966 baseball season. (R. 2388; App. 132b). Transfer of the Braves' franchise from Milwaukee made that city the first since 1903 to be wholly abandoned by major league baseball. (R. 4854).

After the move of the Braves to Atlanta had been approved by the National League, the Wisconsin statutes were amended to authorize Milwaukee County (the "County"), which already owned a suitable baseball stadium and related facilities, to own and operate a professional baseball team. (R. 2336; App. 89b). On July 29, 1965, the Milwaukee Brewers Baseball Club, Inc. (the "Brewers") was incorporated for the purpose of owning and operating a major league franchise in Milwaukee. (R. 2335-36; App. 88b-89b). Both the County and the Brewers are well-qualified to own and operate a major league baseball team.

(R. 2419-2421, 2501; App. 159b-161b, 278e). The County on July 22, 1965, and the Brewers on August 12, 1965, made proper franchise applications to the National and American Leagues. (R. 2460; App. 194b). But on December 2, 1965, the National League rejected both applications. (R. 2421; App. 162b). The American League refused to act. (R. 2460; App. 194b).

Expansion of the number of major league franchises to provide one to serve the Milwaukee market is feasible. (R. 2464; App. 198b). The alleged difficulties which respondents said they would suffer from expanding the League from 10 to 11 or more teams, narrowed down to (1) a lack of players (R. 2422; App. 162b), and (2) an inability to prepare a schedule for an odd number of teams. (R. 2428; App. 167b). The Circuit Court concluded from the record testimony of experts, including Commissioner of Baseball, Ford Frick, the Braves' own manager, and William Veeck, a former owner and manager of several of the major league clubs, "that there are sufficient baseball players to stock a team in Milwaukee." (R. 2422; App. 162b). The Circuit Court was satisfied from the sample 11-team schedules offered and explained on the record, that a "practical schedule can be arranged."[4] (R. 2428; App. 167b). It has been the view of Mr. Frick that expansion of the major leagues to 12 teams would be better for baseball than the present 10-team leagues. (R. 2422; App.

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[4] Each of the ten teams presently in the National League plays 162 games during the baseball season. (Ex. 1, p. 22). The teams are located in 8 states. (R. 2450-51; App. 185b-186b). Rather than playing 162 games in a season, each team in an 11-team league could play 160 games in a season which would be one week longer. (Ex. 589). An alternative schedule could be played without reducing the total number of games and without lengthening the regular playing season by using "split" double-headers (home team plays two different opponents on the same day). (Ex. 591). The actual mileage traveled to meet the new schedules would be approximately the same as that traveled under the present scheduling. (Ex. 590).

162b-163b). This alternative is available. The National League could expand to 12 teams. An application was filed for a major league franchise to operate in the Dallas-Fort Worth area, the largest unserved baseball market in the country.[5] (Milwaukee is the second largest.) (R. 2421, 2405; App. 162b, 146b).

New members can enter this industry only at the sufferance of the existing members. Without a franchise from the National or American Leagues neither the County nor the Brewers can, as a practical matter, organize a major league club. (R. 2458-59; App. 192b-193b). The reason is that organized baseball has a monopoly of player services (R. 2326, 2332, 2466; App. 80b, 86b, 199b), maintained through the use of the so-called "reserve clause,"[6] which bars players for life from employment by teams

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[5] A baseball market is considered to consist of an area within a 50-mile radius of the stadium. (R. 2415; App. 156b).

[6] The "reserve clause," which applies to all players in organized baseball (both in the major leagues and in the minor leagues), is a scheme of contractual provisions and rules. The rules permit each major league club, after each season, to "reserve" up to 40 players for the ensuing season (Major League Rule 4-A, Ex. 1, p. 530), and prohibit players, while they are under contract or "reserved," from negotiating for employment with any other club. (Major League Rule 3(g), Ex. 1, p. 513). The Uniform Players Contract (Ex. 5) gives each club the unilateral right to renew each player's contract for the following season and prohibits a player under contract from playing baseball for any other club. The effect of the reserve clause is that each player must play for the club which owns his contract or he will be prevented from playing professional baseball anywhere in the United States. (R. 2328-2332; App. 82b-86b). Minor league players are subject to similar reserve provisions. (Ex. 1, p. 626).

outside organized baseball,[7] and is enforced by blacklisting players who accept such employment. (R. 2458; App. 192b). Furthermore, the major league teams have agreed not to play with non-league teams during the season. (R. 2453; App. 188b).

There was testimony that the scarcity of franchises greatly increases the market value of each existing franchise and each franchise owner's bargaining power. (R. 3399-3402, 3446-47). Respondents' agreement to remove the Braves' franchise from Milwaukee and to prevent Milwaukee applicants from securing an expansion franchise maintains the scarcity of franchises.[8]

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[7] As the then Commissioner of Baseball, Mr. Ford Frick, testified (R. 2331; App. 85b):

> "Q. If that player quits a baseball team, can he play baseball with any other baseball team that is governed by the League Rules or Agreements?
>
> "A. Not governed by the book [agreements governing organized baseball].
>
> "Q. And that would literally eliminate him from what we know in this country as professional baseball, would it not, sir?
>
> "A. In this country, organized baseball. It doesn't prevent him from going to Japan or Venezuela or any other place, playing semi-pro or anything of that sort."

[8] From the evidence before it relating to the limitation of franchises to 16 for over 60 years, the destruction by the major leagues of the fledgling Federal League (R. 3376), the wholesale blacklisting of players after the 1946 Mexican League war (R. 3389) and the destruction in 1960 of Branch Rickey's proposed Continental League by the absorption into the existing major leagues of four continental league cities (R. 2398; App. 140b; Exs. 7, 38), the Circuit Court found as a fact that (R. 2458; App. 192b):

> "25. Over a period of many years, the defendants and the American League and its members have achieved adherence to the Major League Agreement, the Professional Baseball Agreement, and the National Association Agreement of all persons engaged in professional baseball by the use, and threat of use, of practices such as refusing to deal with clubs and

Respondents' unlawful conduct threatened to injure not only the Milwaukee applicants for major league franchises (the Brewers and the County) but also the County in its capacity as owner of the Milwaukee stadium, since it would not be able to secure a suitable substitute tenant (R. 2460; App. 194b), and other commerce in Wisconsin which is dependent upon major league baseball. (R. 2460-61; App. 195b-196b). Expert economist Robert T. Nathan testified that the commercial impact on Milwaukee of respondents' boycott was estimated at 18 million dollars per year.[9] (R. 2343; App. 94b). The trade and commerce involved constitutes not only the exhibition for profit of major league baseball games, but also the broadcasting, televising and reporting thereof. (R. 2461; App. 195b).

From these facts, and using federal precedents as a guide in accordance with Wisconsin practice, the Circuit Court concluded as a matter of law that "the refusal of the National League and the failure of the American League to issue a franchise to Milwaukee County or the Milwaukee Brewers, Inc., was a concerted refusal to deal" illegal under Wisconsin law, whether it be judged as a

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leagues not parties to said agreements and excluding from employment as a player any player who failed or refused to submit to or be bound by the terms of those agreements and rules promulgated pursuant thereto. Since the establishment of the American League, all attempts to organize additional Major Leagues have been prevented by the defendants and the American League and its members."

[9] For example, over the period 1953-65, the Braves paid Milwaukee County $2,800,000 in rent; the County earned $1,600,000 in parking fees; and the Braves' payroll in Milwaukee was $17,600,000. The Braves purchased over $5,500,000 of perishables for resale at baseball games. (R. 2341; App. 92b). The Braves themselves represented to the other respondents (to justify their decision to move) that in the years 1953 to 1963 inclusive, over $50,000,000 out-of-town revenue was brought into the City of Milwaukee by major league baseball. (R. 2341; App. 92b; Ex. 10).

boycott unlawful *per se*,[10] or judged by the rule of reason.[11] It held, moreover, that the refusal to deal constituted an act of monopolization,[12] and a violation of the common law prohibition against a monopoly's unreasonable refusal to deal.[13] (R. 2467; App. 200b).

On May 5, 1966, judgment was entered against the respondents. (R. 2497; App. 275e). It assessed maximum statutory forfeitures of $5,000 against each respondent except the National League and awarded injunctive relief.

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[10] See *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *Peoples Gas Co.*, 364 U.S. 656 (1961); *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Washington State Bowling Proprietors Assn.* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), certiorari denied, 384 U.S. 963 (1966); *People* v. *Santa Clara Valley Bowling Proprietors' Assn.*, 47 Cal. Rptr. 570 (Dist. Ct. App. 1965).

[11] See *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952), certiorari denied, 344 U.S. 817 (1952); *United States* v. *Associated Press*, 52 F.Supp. 362 (S.D.N.Y. 1943), affirmed, 326 U.S 1 (1945)

However, both the Circuit Court and the Wisconsin Supreme Court held that they would not follow this Court's decisions in *Federal Baseball Club* v *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), in interpreting the state statute. (R 2171-80, 9480-81; App 221c-229c, 20a).

[12] See *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Six Twenty-Nine Prods, Inc.* v. *Rollins Telecasting, Inc.*, 1966 CCH Trade Cases ¶ 71,878 (5th Cir., August 30, 1966); *Packaged Programs, Inc.* v. *Westinghouse Broadcasting Co., Inc.*, 255 F.2d 708 (3d Cir. 1958).

[13] See *Munn* v. *Illinois*, 94 U.S. 113, 131-32 (1876); *Falcone* v. *Middlesex County Medical Soc.*, 34 N.J. 582, 170 A.2d 791 (1961); *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Allnutt* v. *Inglis*, 12 East 527, 104 Eng. Rep. 206 (K.B. 1810); compare *United States* v. *Terminal Railroad Assn.*, 224 U.S. 383 (1912).

In framing the decree, the Circuit Court recognized that, even if it had the power, it was not required to invalidate the monopoly's control of players' services and free them to deal directly with Wisconsin applicants. (R. 2448; App. 184b).[14] It enjoined respondents from "refusing to grant the application for membership in the National League submitted by Milwaukee County or Milwaukee Brewers Baseball Club, Inc., or by some other suitable person . . . ." (R. 2501; App. 278e). It further required the respondents to facilitate the organization and operation of a team, and to adopt and execute "an equitable plan for providing a supply of major league professional players for such team."[15] (R. 2501; App. 279e).

The Supreme Court of Wisconsin (the court below), assuming that the Circuit Court's findings of fact were supported by the evidence, reversed and ordered the complaint dismissed. (R. 9466, 9483; App. 24a, 281f). The majority rejected respondents' state-law defenses, and agreed with the Circuit Court that respondents had violated the Wisconsin antitrust law (R. 9477; App. 16a):

> "It seems crystal clear that under today's structure of organized professional baseball, defendants and the members of the American League have complete power to control participation in major league baseball, and to control the number of teams and the location of their home games; that although the power is shared with the American League, defendants nevertheless have very substantial and effective power of control; that major league baseball, as now carried on, is a

[14] See *United States* v. *Terminal Railroad Assn.*, 224 U.S. 383 (1912).

[15] The complaint in this action originally alleged that the removal of the Braves from Milwaukee to Atlanta was wrongful and sought an order preventing the Braves from removing the franchise to Atlanta. (R. 11, 15). While the Circuit Court below awarded an injunction barring the franchise shift as alternative relief (R. 2501-03; App. 279e-280e), the Supreme Court of Wisconsin held that on state law grounds it would not sanction the entry of any such order in this action. (R. 9484; App. 25a).

> business in which large sums are invested, and substantial gains received by players and owners, and that many other business activities are generated by and dependent upon it; that all the continuous interaction which constitutes major league baseball, and which holds the interest and support of the public has for 13 years reached into Wisconsin, but it now operates entirely outside this state; that defendants have, by agreement among themselves to transfer the Braves, *terminated very substantial business activity in Wisconsin, and are totally and effectively preventing its resumption at the present time. On their face, these facts support a conclusion that there is a combination or conspiracy in restraint of trade and commerce, declared illegal by the first sentence of sec. 133.01, Stats., as well as a combination to monopolize trade, under the third sentence of the section.*" [Emphasis supplied.]

The majority also found that it was probable, if not certain, that "the operations of organized baseball are rife with violation of the Sherman Act if it were to be applied . . . ." (R. 9492; App. 36a).

The majority ordered the complaint dismissed irrespective of this monopolization and boycott, solely on the ground that the federal Constitution barred state jurisdiction. The majority opinion stated (R. 9495; App. 39a):

> "A majority of this court (though not in complete agreement as to which of the two theories just stated is controlling), conclude that the Wisconsin antitrust statute cannot, because of requirements of the federal constitution, be applied to concerted action by the defendants in moving the Braves from Milwaukee and refusing applications by others for a franchise."

The two theories relied upon by the majority were that: (1) this Court's decisions in *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), together with Congressional inaction on the subject, evidenced a "national policy" which constitutionally pre-empted state anti-

trust laws insofar as they applied to organized baseball, and (2) the Commerce Clause barred the antitrust enforcement sought by the State because of the possibility that such enforcement might conflict with that of other states. (R. 9493-95; App. 37a-39a).

The three dissenting justices agreed with the majority that respondents had violated Wisconsin's antitrust law. (R. 9496; App. 40a-41a). But the dissenters reasoned that Wisconsin's antitrust law could be pre-empted only by express federal legislation, and concluded that "the proposition that the majority asserts is a novel one without prior foundation in constitutional law and is an express repudiation of the doctrine that there shall be pre-emption or a superseding of state regulations only by express legislation." (R. 9499; App. 44a). In any event, said the dissent, Congressional silence in the light of *Federal Baseball* and *Toolson* indicated no intention to displace state antitrust law. (R. 9498; App. 43a).

The dissent also concluded that the Commerce Clause was no barrier to the State's action. It noted that respondents had not claimed that Wisconsin's antitrust law was applied in a discriminatory manner. Nor, said the dissent, could the application of state law in this case unduly burden interstate commerce. To the contrary, the dissent reasoned, the Circuit Court's decree cured the violations with minimal burdens upon respondents. It found it "difficult to see what national interest is preserved by immunizing this organization from the consequences of its violation of state law." [16] (R. 9502-06; App. 48a-53a).

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[16] Related actions are now pending in the United States District Court for the Eastern District of Wisconsin. In *Milwaukee Braves, Inc.* v. *Grobschmidt*, No. 65-C-196, plaintiff seeks to enjoin the County of Milwaukee and the Attorney General of Wisconsin from enforcing State or federal antitrust laws against the Braves. In *County of Milwaukee* v. *Milwaukee Braves, Inc., et al.*, No. 65-C-207, Milwaukee County charges the respondents with violation of federal and State antitrust laws.

REASONS FOR GRANTING THE WRIT

Organized baseball was originally held by this Court to have too little involvement in interstate commerce to permit the exercise of federal jurisdiction.[17] *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922). It achieved this result in part by representing to this Court that state law would protect the public. See pp. 26-7, *infra.* Yet the court below now paradoxically holds that organized baseball has so much involvement in interstate commerce that the State is constitutionally powerless to protect its public from what the court below characterized as the industry's "arbitrary and unfair dealing." (R. 9495; App. 40a). Baseball thus becomes the only non-regulated industry in the United States completely free to disregard both federal and state antitrust laws. So far as we can discover, this Court has never held that, where Congress has not covered an enterprise under the federal antitrust laws, that enterprise becomes immune to state antitrust law as well. This remarkable result in itself requires review by this Court.

Furthermore, the decision of the court below that state law is preempted by Congressional inaction will inevitably frustrate state antitrust enforcement against many other industries engaged in interstate commerce. If a "national policy" barring state antitrust law can be constructed from Congressional failure to regulate organized baseball, a similar "national policy" displacing state law can be constructed wherever Congress may be deemed to have adopted a policy of federal non-regulation, whether by legislation or inaction.

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[17] Petitioner assumes arguendo for the purpose of this petition that the federal antitrust laws are wholly inapplicable to organized baseball. However, petitioner believes that federal law does apply in the circumstances of this case; and, if certiorari is granted, petitioner will argue that the Sherman Act applies and that, for this additional reason and under the authorities cited in footnotes 21-23, *infra,* state law is not pre-empted.

The pre-emption doctrine here is based on a more violent distortion of *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), and has much more far-reaching and disturbing implications than the decision of the lower court in *Radovich* v. *National Football League*, 352 U.S. 445, 447 (1957), in which this Court granted certiorari "to clarify the application of the *Toolson* doctrine."

The second ground for the decision below is just as dangerous a constitutional precedent as the pre-emption theory. The court below held that the mere possibility of a future conflict with the regulatory laws of other states entitles any business engaged in both intrastate and interstate commerce to violate a state's antitrust law with impunity. No longer is actual conflict required.

The decisions of this Court have encouraged state enforcement and have repeatedly considered and rejected a variety of constitutional defenses asserted by resourceful violators of state antitrust law.[18] The Commerce Clause concept announced by the court below, unless promptly arrested, could become as formidable an obstacle to state antitrust enforcement as the Due Process Clause and the notion of "natural law" were once considered to be.

The question of the power of the states to enforce their own antitrust laws is especially significant at the present

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[18] *Tigner* v. *Texas*, 310 U.S. 141 (1940) (equal protection); *International Harvester Co.* v. *Missouri*, 234 U.S. 199 (1914) (equal protection); *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157 (1912) (equal protection, due process); *German Alliance Ins. Co.* v. *Hale*, 219 U.S. 307 (1911) (equal protection, due process); *Grenada Lumber Co.* v. *Mississippi*, 217 U.S. 433, 441 (1910) (14th amendment); *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909) (equal protection, due process, impairment of contracts); *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 107 (1909) (art. 1, sec. 10); *Carroll* v. *Greenwich Ins. Co.*, 199 U.S. 401 (1905) (14th amendment); *National Cotton Oil Co.* v. *Texas*, 197 U.S. 115 (1905) (equal protection, due process); *Smiley* v. *Kansas*, 196 U.S. 447 (1905) (14th amendment).

time because of the increasing importance of such enforcement as a supplement to federal antitrust regulation. Both the United States Department of Justice [19] and the Federal Trade Commission [20] encourage the states to enforce their antitrust laws and to cooperate with the federal government in doing so. The National Commission on Uniform State Laws, the National Association of Attorneys General, and other professional groups are working on a proposed uniform or model state antitrust law. These developments make it particularly appropriate for this Court to reverse a precedent which bars a state's application of its antitrust laws to a business merely because of a possibility of conflict with the laws of other states.

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[19] The Department of Justice recognizes that state enforcement against restraints of trade is "a valuable complement to the federal antitrust program, with benefits to the national competitive climate that are felt beyond state borders." Amicus brief for the United States in *State* v. *Sterling Theatres Co.*, 64 Wash. 2d. 761, 394 P. 2d 226 (1964), p. 11. See also amicus brief for the United States in *State v. Southeast Texas Chapter*, 358 S.W. 2d 711 (Tex. Civ. App. 1962), certiorari denied, 372 U.S. 965, 969 (1963).

[20] See Federal Trade Commission press release dated October 14, 1965, announcing the establishment of the Office of Federal-State Cooperation.

I. IN EXTENDING ORGANIZED BASEBALL'S FEDERAL ANTITRUST EXEMPTION TO PRE-EMPT THE APPLICATION OF STATE ANTITRUST LAWS, THE COURT BELOW HAS MISINTERPRETED THIS COURT'S DECISIONS AND SUBSEQUENT CONGRESSIONAL INACTION AND HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

A. The Court Below Erroneously Held That Application of State Antitrust Laws to an Industry Were Pre-empted by an Exemption of that Industry from the Non-preempting Federal Antitrust Laws.

Until the decision below, it had been considered well-settled by decisions of this Court [21] and of the lower federal and state courts [22] that the Sherman Act [23] and other fed-

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[21] See *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 495 (1949); *Watson* v. *Buck*, 313 U.S. 387, 403-04 (1941); *Straus* v. *American Publishers' Assn.*, 231 U.S. 222 (1913); *Standard Oil Co.* v. *Tennessee*, 217 U.S. 413 (1910). *Cf. Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937) (sustaining Puerto Rico antitrust act against claim of pre-emption by Sherman Act.)

[22] See, *e.g.*, *State* v. *Sterling Theaters*, 64 Wash. 2d 761, 394 P.2d 226 (1964); *State* v. *Southeast Texas Chapter*, 358 S.W. 2d 711 (Tex. Civ. App. 1962), certiorari denied, 372 U.S. 965, 969 (1963); *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777 (1960); *Alfred M. Lewis, Inc.* v. *Warehousemen Local Union No. 542*, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950), certiorari denied, 340 U.S. 911 (1951); *Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1948), appeal denied, 274 App. Div. 877, 83 N.Y.S. 2d 228 (1948); *Speegle* v. *Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P.2d 867 (1946); *Leader Theatre Corp.* v. *Radforce Amusement Corp.*, 186 Misc. 280, 58 N.Y.S. 2d 304 (Sup. Ct. 1945), affirmed, 273 App. Div. 844, 76 N.Y.S. 2d 846 (1948); *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F.2d 73, 82 (6th Cir. 1943). *Cf. Territory* v. *Long Bell Lumber Co.*, 22 Okla. 890, 99 Pac. 911 (1908); *People* v. *National Research Co.*, 20 Cal. Rptr. 516, 524 (Dist. Ct. App. 1962).

[23] Senator Sherman described the purpose of the Sherman Act, now 15 U.S.C. § 1, *et seq.*, as follows:

> "This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations

eral antitrust laws do not pre-empt or displace state antitrust laws, but create overlapping and concurrent jurisdiction. In particular "[t]hat states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question. . . . Agreements and combinations not to sell to or buy goods from particular persons . . . are well recognized trade restraint practices which both state and national legislation can and do prohibit." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 495 (1949).

Thus, even if Congress were to overrule *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), and *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and apply the federal antitrust laws to organized baseball, state antitrust law would not be pre-empted from reaching organized baseball. Yet the court below holds that this Court's decisions in *Federal Baseball* and *Toolson*, excluding organized baseball from the coverage of the federal antitrust laws, combined with subsequent Congressional inaction, do pre-empt state antitrust law.

So far as we have discovered, this Court has never held that, where Congress has not covered an enterprise under the federal antitrust laws, that enterprise becomes immune to state antitrust law as well. Nor have we found any authoritative case under any other non-pre-empting federal

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. . . when they affect injuriously our foreign and interstate commerce . . . and in this way to *supplement the enforcement of the established rules of the common and statute law by the courts of the several States* in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may *co-operate with the State courts* in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." [Emphasis supplied]. 21 Cong. Rec. 2457 (1890). See also H.R. Rep. No. 1707 51st Cong., 1st Sess. (1890), p. 1.

regulatory law holding that when Congress decided not to cover an industry, it thereby pre-empted state law.

The holding of the court below conflicts in principle with the decisions of other state courts holding that the Clayton Act's express exemption of labor organization activities from the federal antitrust laws[24] does not exempt these activities from state antitrust laws. See, *e.g.*, *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950), certiorari denied, 340 U.S. 911 (1951); *Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1948), appeal denied, 274 App. Div. 877, 83 N.Y.S. 2d 228 (1948).

As the New York Court stated in *Mayer Brothers*, 274 App. Div., at 176, 80 N.Y.S. 2d, at 881:

> "[W]ithdrawal [of the activity from the federal antitrust laws] has left in force the statute and common law of the States upon the same subject, which in many instances antedated the adoption of the Sherman Act, and the power of the State courts to enforce their own law remains, even in cases involving interstate commerce, where the Federal Government has not occupied the entire field . . . ."[25]

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[24] Strictly "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act [which contains the exemption] and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *United States* v. *Hutcheson*, 312 U.S. 219, 231 (1941).

[25] In *McHugh* the Massachusetts Supreme Judicial Court similarly stated (326 Mass., at 268, 93 N.E. 2d, at 763-64):

> "This is simply an instance where State law is somewhat more inclusive than the Federal law as now amended. It would seem that in the absence of complete preemption of the field such differences are permissible, and that State law may cover a form of monopoly which the Federal law no longer reaches."

The argument that the Clayton Act labor exemption, 29 U.S.C. § 52, barred state antitrust jurisdiction was unsuccessfully urged as

These state holdings are corroborated by this Court's decisions permitting application of state law to labor union activities exempt by the Clayton Act from the federal antitrust laws. *E.g.*, compare *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942) with *United States v. Hutcheson*, 312 U.S. 219 (1941). See also *Maryland and Virginia Milk Producers Assn., Inc.* v. *United States*, 362 U.S. 458, 464 (1960); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 496 (1949).

Organized baseball is at best the beneficiary of an implied exemption from the Sherman Act that originated in the theory that it was local in character and has since been preserved as a matter of *stare decisis*. Organized labor, on the other hand, enjoys an express exemption from the Sherman Act to foster its legitimate activities. Under these circumstances, it would indeed be ironic if organized baseball should enjoy an exemption from state antitrust laws not possessed by organized labor.

To a great extent, state antitrust jurisdiction over organized labor is now, of course, pre-empted by the Labor Act, 29 U.S.C. § 141 *et seq.* *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348

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a reason for certiorari in *McHugh*. See petition for certiorari, No. 359, 1950 Term, pp. 31-32.

See also *American Export Door Corp.* v. *John A. Gauger Co.*, 154 Wash. 514, 524, 283 Pac. 462, 465 (1929) (federal exemption for export trade associations, 15 U.S.C. §§ 62, 63, does not bar application of antitrust provision in State constitution).

There are a number of other federal antitrust exemptions which, under the decision below, could be argued to pre-empt state law. These include: 7 U.S.C. § 291 (agricultural associations), 15 U.S.C. § 521 (fishery associations), 46 U.S.C. § 885 (marine insurance associations), 15 U.S.C. § 636(a)(6) (small business concerns), 15 U.S.C. § 17 (agricultural and horticultural cooperatives).

Of course, non-antitrust federal regulation (particularly through federal regulatory agencies) in the area of federal antitrust exemptions will often pre-empt state law.

U.S. 468 (1955). This is because the Labor Act is a pervasive regulatory scheme that proves a Congressional purpose to occupy the field. It perfectly illustrates the critical distinction between the pre-emptive effect of a Congressional decision to adopt an encompassing regulatory statute and the non-pre-emptive effect of more limited types of federal regulation such as the antitrust laws.

Furthermore, it appears that even in the case of a pervasive federal regulatory scheme such as the Labor Act, an express Congressional decision to exempt a certain class of employees from the Act does not pre-empt state regulation of the federally exempted class. This Court recently held that the Labor Act's exemption of supervisory employees does not pre-empt state laws. *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181 (1965). It found no pre-emption because "Congress made no considered decision generally to exclude state limitations . . . ." 382 U.S., at 190. If the pre-empting Labor Act does not displace state law as to classes of persons not covered by the Act, it is difficult to see how the non-pre-empting Sherman Act can do so. And if an express Congressional exemption from the Labor Act is not the "considered decision" required to pre-empt state law, surely no such "considered decision" can be found in mere Congressional inaction after *Federal Baseball* and *Toolson*.

The court below based its extraordinary concept of pre-emption by non-coverage upon both the Supremacy and Commerce Clauses of the Constitution. The error of reliance upon the Supremacy Clause is apparent on its face. That clause provides that the "Laws of the United States . . . shall be the supreme Law of the Land . . . ." "National policy" is not a Law. At best, this Court has ruled that the antitrust laws passed by Congress do not cover organized baseball; but Congress has passed no law exempting baseball from state antitrust laws, or pre-empting state antitrust laws in any respect whatever, expressly or by reasonable implication.

The lower court's reliance on "national policy" as a basis for pre-emption by operation of the Commerce Clause is equally unsound. The court below did not, in this respect, consider the application of the Commerce Clause of its own force. It erroneously derived its "national policy" by guessing [26] whether Congress by its silence intended to extend this Court's baseball decisions beyond an exclusion from coverage of federal law into a pre-emption of state law. The only Congressional expression of "national policy" pertinent to a pre-emption question under the Commerce Clause is that expressed in Acts of Congress.[27] For example, the "national policy" specifically expressed in the Interstate Commerce Act (54 Stat. 899 (1940))—that there is a vital federal interest in an efficient national rail transportation system—has been invoked to strike down a state law regulating the length of trains. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 773 (1945). There is no such authoritative Act of Congress expressing any national interest in organized baseball or in its freedom to operate without federal or state antitrust restraints.[28] The only relevant federal statutes are the federal anti-

[26] The court below quotes with approval a commentator's advice that: "The Court has to guess, and in guessing it is likely to conceive that its wisdom coincides with the wisdom of Congress." Ribble, State and National Power Over Commerce (1937), p. 212.

[27] While it is sometimes said that, where there is no relevant legislation, the Court's duty is to determine the presumed intent of Congress where Congress has not spoken, this is merely another way of stating what the Commerce Clause itself requires. See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 768 (1945). Therefore, the Court's duty in such circumstances under the Commerce Clause is not to determine what Congress *in fact* would have done if it had legislated, but to determine, upon an independent appraisal of the facts, what limitations the Commerce Clause itself imposes. Since the court below purported to give a meaning to Congressional *inaction* beyond that which the Commerce Clause would itself require, its decision erroneously applied that clause.

[28] Of course, 15 U.S.C. § 1291 *et seq.* exempts certain television pooling agreements from the federal antitrust laws.

trust laws themselves. As we have shown, the language and policy of those laws do not pre-empt; they contemplate concurrent federal and state enforcement.

Moreover, even if a "national policy" can properly be discovered in Congressional inaction, Congressional silence here supports, rather than denies, state power over organized baseball. Certainly it falls far short of showing the "considered decision" or "clear and manifest purpose of Congress" needed to displace state law.[29]

B. Contrary to the View Taken in the Decision Below, If There Is Any National Policy Disclosed by the Decisions of This Court and the Silence of Congress, It Is a Policy of Permitting States to Apply Their Antitrust Laws to Organized Baseball.

Neither this Court's decisions in *Federal Baseball* or *Toolson*, nor the decisions of any other court that we have found, have either directly or by implication held that organized baseball is exempt from state antitrust laws. To the contrary, this Court's decisions in *Federal Baseball* and *Toolson* have always been thought to confirm state authority over the business of organized baseball, and Congressional failure to enact legislation on the matter supports continued state power. Moreover, on both occasions when organized baseball persuaded this Court to withhold application of federal antitrust law to its monopoly, it specifically represented that state regulation would continue to apply to it.

The first reported case to consider the applicability of the Sherman Act to organized baseball was *American League Baseball Club* v. *Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). There the Chicago club of the American League sued to enjoin a player from taking a job with a

[29] See *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181, 190 (1965); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1962); *California* v. *Zook*, 336 U.S. 725, 733 (1949).

rival club in the fledgling Federal League. The player defended on the ground that the reserve clause violated the federal antitrust law and the state common law condemning restraints of trade. The court refused to require compliance with the contract containing the reserve clause. It rejected the federal law defense on the ground that the business of baseball was not interstate trade or commerce and was not, therefore, subject to the Sherman Act. The court nevertheless held that the contract was unenforceable as an unlawful restraint of trade in violation of state common law. The court thus applied state antitrust law though holding that the Sherman Act was inapplicable. See also the earlier decisions in *American Base Ball & Athletic Exhibition Co.* v. *Harper*, 54 Central L. J. 449, 450-51 (Mo. Cir. Ct. 1902) (semble); *Allegheny Base Ball Club* v. *Bennett*, 14 Fed. 257, 259-60 (C.C.W.D. Pa. 1882).

Subsequent to the *Chase* decision, organized baseball used extra-legal means, such as threats of black-listing, and by such predatory acts of monopolization sought to drive the rival Federal League out of business. See H.R. Rep. No. 2002, 82d Cong., 2d Sess. (1952), pp. 50-57. After the Federal League dissolved, the defunct Baltimore club brought suit for treble damages against organized baseball charging a violation of the Sherman Act. Plaintiff succeeded in the District of Columbia trial court, but the court of appeals reversed, relying upon the *Chase* decision and holding that the Sherman Act did not apply to baseball. *National League* v. *Federal Baseball Club*, 269 Fed. 681, 686, 50 App. D. C. 165, 170 (1920). In this Court, respondents—organized baseball—relied heavily on the earlier *Chase* decision. See 259 U.S., at 206; respondents' brief, No. 204, 1921 Term, pp. 59-60. And respondents plainly adopted not only the Sherman Act holding in that case, but also the holding that baseball was subject to state law. They conspicuously urged that federal antitrust regulation of organized baseball was unnecessary to protect the public because organized baseball was subject to state law. They argued (brief, pp. 67-68):

> "Such a limitation on local self-government and such an extension of the powers of Congress is not justified by any great public necessity. *A State is entirely competent to reach and deal with any evil in the field of sport requiring legislative remedy. This is true as respects the provisions of players' contracts and the protection of the rights of the public in the matter of charges for admission, and other matters.*" [Emphasis supplied.]

Presented with these representations, this Court established, as a corollary to the federal antitrust exemption, that organized baseball is subject to state law, stating (259 U.S., at 208): "we are of opinion that the Court of Appeals was right. The business is giving exhibitions of base ball, which are purely state affairs."

In the ensuing years *Federal Baseball* was widely and almost uniformly cited to support state power over activities which, like baseball, had interstate aspects but were deemed to be "local" businesses.[30] The precedent of the

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[30] See, *e.g.*, *Metropolitan Casualty Ins. Co. of New York* v. *Huhn*, 165 Ga. 667, 676-77, 142 S.E. 121, 125 (1928) (state workmen's compensation act properly applied to baseball club); *Boynton* v. *Fox West Coast Theatres Corp.*, 60 F.2d 851, 853 (10th Cir. 1932) (enforcement of state Sunday law against motion picture theatres sustained); *Neugen* v. *Associated Chautauqua*, 70 F.2d 605 (10th Cir. 1934) (state workmen's compensation act may be applied to travelling entertainer); *In Re American States Public Service Co.*, 12 F.Supp. 667, 693 (D. Md. 1935) (dictum) ("it has been held, with respect to the following types of businesses, that the fact that the mails or instrumentalities of interstate commerce are used by them does not convert them into businesses of an interstate character, and thereby . . . immunize them from state regulation or control . . . athletic entertainers . . . *Federal Baseball Club* v. *National League*, 259 U.S. 200 . . . ."), modified, 81 F.2d 721 (4th Cir.), certiorari denied, 297 U.S. 724 (1936); *Matter of Mallia*, 299 N.Y. 232, 241, 86 N.E. 2d 577, 582 (1949) (state unemployment compensation law may be based on entire earnings of employee even though he travels across state lines and earns part of wages in another state).

Chase case—that organized baseball is subject to state antitrust regulation—until now has never been judicially questioned,[31] and was followed by the New York courts as recently as 1959. In *Blake* v. *Frick*, 20 Misc. 2d 520, 521-22, 191 N.Y.S. 2d 177, 179 (Sup. Ct. 1959), appeal dismissed, 9 App. Div. 2d 893, 199 N.Y.S. 2d 396 (1959), two minor league players sought a "declaratory judgment decreeing that the uniform player's contract . . . be adjudged void and unlawful, that the defendants be enjoined in New York from monopolizing the baseball business, [and] enforcing salary limtations . . . ." The court stated that insofar as the complaint sought relief with respect to a labor dispute, the action was pre-empted by the National Labor Relations Act. But insofar as the complaint sought a declaration as to the legality of the plaintiffs' contracts under the state antitrust laws, the court, relying on *Chase*, agreed that it stated a claim.

Indeed, at least one Congressional committee, which made a thorough study of organized baseball and court decisions on that subject, has apparently recognized the validity of the *Chase* decision and of state antitrust regulation of organized baseball. See H.R. Rep. No. 2002, 82nd Cong., 2nd Sess. (1952), pp. 127, 130.

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[31] See *American League Baseball Club* v. *Pasquel*, 188 Misc. 102, 66 N.Y.S. 2d 743 (Sup. Ct. 1946) (court finds that illegality probably no defense in suit by New York Yankees to enjoin Mexican League club from inducing players to breach their contracts with Yankees, but stating: "[*a*]*s defendants invoke the common law*, a New York statute, the Clayton Act . . . and . . . the Sherman Antitrust Act . . ., I pass the question whether or not under any circumstances exhibitions of baseball could be regarded as trade or commerce within the meaning of any of those statutes . . . ." [Emphasis supplied.]; *American League Baseball Club* v. *Pasquel*, 187 Misc. 230, 62 N.Y.S. 2d 537 (Sup. Ct. 1946) (considering legality of organized baseball structure under New York law, but refusing to issue a preliminary injunction). But compare *Oliphant v. New York Yankees, Inc.*, 42 Misc. 2d 394, 248 N.Y.S. 2d 350 (Civil Ct. 1964).

This Court's 1953 decision in *Toolson,* in declining to overrule the earlier *Federal Baseball* decision, did nothing to broaden it. *Toolson*—and its two companion cases which were disposed of in the same opinion—involved suits challenging organized baseball's enforcement of the reserve clause. Respondents (defendants) in the *Toolson* case again reminded this Court that organized baseball *was* amenable to state regulation. See respondents' brief, No. 18, 1953 Term, p. 30.

In the *Toolson* opinion this Court did no more than confirm the decision in *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the *federal* antitrust laws." 346 U.S., at 357. [Emphasis supplied.] In subsequent lower court cases it has been assumed that *Toolson,* like *Federal Baseball,* supports state authority.[32]

This Court itself in subsequent cases, holding the theatrical, boxing and football businesses subject to the federal antitrust laws, has made clear the narrow scope of the *Toolson* decision. It has emphasized that *Toolson* was a "narrow application of the rule of *stare decisis,*" and that if "the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress." *United States* v. *Shubert,* 348 U.S. 222, 230 (1955). See also *United States* v. *International Boxing Club,* 348 U.S. 236, 243 (1955).

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[32] See, *e.g., New Orleans Opera Guild, Inc.* v. *Local 174, Musicians Mutual Protective Union,* 127 So. 2d 358, 361 (La. Ct. App. 1961) (state antitrust law may be applied to musicians union; no N.L.R.A. pre-emption), affirmed on other grounds, 242 La. 134, 134 So. 2d 901 (1961); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.,* 149 Colo. 259, 272, 368 P.2d 970, 976-77 (1962) (dissent) (state can apply anti-discrimination law to airline pilots), reversed on other grounds, 372 U.S. 714 (1963); *Pennington* v. *Birmingham Baseball Club, Inc.,* 277 Ala. 336, 343, 170 So. 2d 410, 415-16 (1964) (state may enjoin unlawful picketing at baseball park despite N.L.R.A.).

More recently, this Court said again that "[a]s long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases." *Radovich* v. *National Football League,* 352 U.S. 445, 451 (1957).[33]

If the silence of Congress reflects any decision to continue the exemption from federal law granted organized baseball by this Court, that silence necessarily involves approval of the corollary, originating in this Court's theory that baseball was a local affair, that the narrow federal antitrust exclusion approved by the Court did not bar state antitrust power.

Indeed, even the legislative history of unenacted bills to subject organized baseball to, or exempt it from, the federal antitrust laws discloses no purpose to pre-empt state law. So far as we know, not one bill has ever been introduced in Congress to exempt baseball from *state* antitrust laws,[34] nor has any committee of Congress proposed such legislation or suggested that existing federal legislation displaces state law.

C. There Was No Valid Reliance upon Pre-emption of State Law.

One reason given for this Court's decision in *Toolson* not to overrule *Federal Baseball* was organized baseball's

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[33] "[I]t is sound to confine *Toolson* to its particular factual situation." Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 63.

[34] Bills have been in one of three categories: (1) to exempt baseball and other professional team sports from the federal antitrust laws; (2) to apply federal antitrust laws to baseball and other professional team sports; or (3) to exempt from federal antitrust laws certain aspects of baseball and other professional team sports.

For a capsule description and history, see Sen. Rep. No. 462, 89th Cong., 1st Sess. (1965), pp. 7-11. See also Pierce, *Organized Professional Team Sports and the Antitrust Laws,* 43 Cornell L.Q. 566, 573-74, 578-80 (1958).

reliance upon the continued validity of that ruling.[35] But even if Congress left the baseball decisions standing for the same reasons that this Court in *Toolson* did not overrule *Federal Baseball*, that purpose would not require displacement of state law.

Here—like the situation in *International Boxing*, 348 U.S., at 242—"[a]t the time the . . . complaint was filed, no court had ever held" that organized baseball was exempt from state antitrust laws. And, here—like the situation in *Shubert*, 348 U.S., at 228-29—at least one case (*Chase, supra*) had held that organized baseball was subject to state antitrust law. Moreover, in light of the uniform understanding that this Court's baseball decisions confirmed state power, and in light of respondents' representations to this Court, it ill behooves them to claim that they have relied over the years on the baseball decisions as immunizing them from state as well as federal antitrust laws. Even if Congress by its failure to overrule those decisions intended to preserve a reliance interest, that purpose does not now require granting immunity from state regulation. To the contrary, the purpose of preserving the existing state of the law is served only by sustaining state authority.

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[35] *Toolson*, 346 U.S., at 357; *Shubert*, 348 U.S., at 229-30; *Radovich*, 352 U.S., at 450-51.

However, *Toolson* evidently preserved the rationale of *Federal Baseball*—that baseball was not sufficiently interstate in character to come within the Sherman Act—in declining to overrule it. In *Radovich*, 352 U.S., at 451-52 this Court stated that "[w]e did not extend them [*Federal Baseball* and *Toolson*] to boxing or the theatre because we believe that the volume of interstate business in each—the rationale of *Federal Baseball*—was such that both activities were within the Act. Likewise, the volume of interstate business involved in organized professional football places it within the provisions of the Act." In *International Boxing*, 348 U.S., at 243 the Court noted that "[t]he controlling consideration in *Federal Baseball* [was] . . . the degree of interstate activity involved in the particular business under review."

Even if this were a case arising under the Sherman Act, preservation of respondents' reliance interest would not bar the antitrust enforcement sought here. *Federal Baseball* and *Toolson* both involved attacks on the validity of the reserve clause, which is claimed to be the keystone of the baseball structure. The decree of the Circuit Court here in no way affected the validity of the reserve clause. Rather, it ordered the respondents to deal in good faith with qualified Milwaukee applicants. The Circuit Court decree ordered them to award a franchise, sell players to the new franchise owner and arrange to play games and otherwise deal with the new franchise owner, actions which respondents have previously taken voluntarily for their own business reasons. Once respondents take the simple action necessary to comply with state law, their business would continue as before.[36]

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[36] Respondents may claim that the holdings of this Court in *Federal Baseball* and *Toolson* disclose a purpose to permit organized baseball, like the New York Stock Exchange, to be self-regulating and, therefore, exempt from the antitrust laws. We have demonstrated above that these cases and Congress' inaction disclose no such purpose. Nor is baseball self-regulating with respect to franchise shifts and expansion. The Commissioner is without jurisdiction to require expansion or prevent the relocation of franchises (R. 3168), and the National League Constitution provides no procedural or substantive standards for deciding upon expansion or a franchise relocation. (R. 2416, 2462; App. 157b, 196b). Under these circumstances, even if organized baseball enjoyed an antitrust exemption to the extent that it was self-regulating, it would enjoy none with respect to expansion or the relocation of franchises. Compare *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). See also *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941).

II. THE HOLDING BELOW THAT THE COMMERCE CLAUSE OF ITS OWN FORCE BARS WISCONSIN'S ANTITRUST ACTION BECAUSE OF THE POSSIBILITY OF CONFLICT WITH THE LAW OF SOME OTHER STATE IS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

This Court has rejected the contention that a state antitrust law affecting interstate commerce is invalid under the Commerce Clause. In *Standard Oil Co.* v. *Tennessee*, 217 U.S. 413 (1910), it was held that Tennessee could constitutionally deal with efforts by Standard Oil of Kentucky to injure a Pennsylvania competitor by inducing Tennessee dealers to cancel orders. The Court noted that the statute was

> "not even directed against interference with that [interstate] business specifically, but against acts of a certain kind that the State disapproved in whatever connection. The mere fact that it may happen to remove an interference with commerce among the States as well with the rest does not invalidate it." 217 U.S., at 422.

Since then, most state and lower federal courts have consistently sustained state antitrust enforcement which affects interstate commerce.[37]

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[37] *State* v. *Sterling Theatres*, 64 Wash. 2d 761, 394 P.2d 226 (1964); *Henry G. Meigs, Inc.* v. *Empire Petroleum Co.*, 273 F.2d 424, 430-31 (7th Cir. 1960); *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777 (1960); *Alfred M. Lewis, Inc.* v. *Warehousemen Local Union No. 542*, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Oliver* v. *All-States Freight, Inc.*, 156 N.E. 2d 190 (Ohio Ct. App. 1957), appeal dismissed, 167 Ohio St. 299, 147 N.E. 2d 856 (1958), reversed on other grounds *sub nom. Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959); *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950), certiorari denied, 340 U.S. 911 (1951); *Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1948), appeal denied, 274 App. Div. 877, 83 N.Y.S. 2d 228 (1948); *Speegle* v. *Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P.2d 867 (1946); *Leader Theatre Corp.* v. *Randforce Amusement Corp.*, 186 Misc. 280, 58 N.Y.S. 2d 304 (Sup. Ct. 1945), affirmed, 273 App. Div. 844, 76 N.Y.S. 2d 846 (1948); *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *Opinion of the Justices*, 211 Mass. 620, 99 N.E. 294 (1912).

It thus seems plain that organized baseball, like any other business having interstate aspects, enjoys no general immunity under the Commerce Clause from state antitrust enforcement. Nor is the application of Wisconsin's law barred by the Commerce Clause in the particular circumstances of this case: "State regulation, based on police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 448 (1960). Accord, *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 428-29 (1963).[38] The court below misapplied this well-established test.

The court below made no finding that Wisconsin's law as applied discriminated against interstate commerce. Instead, apart from its misplaced reliance upon a "national policy" presumed from Congress' inaction (pp. 19-25, *supra*), the decision on the Commerce Clause issue appears to rest on the lower court's determination that the Commerce Clause, of its own force, requires uniform national regulation of baseball—*i.e.*, in truth, no regulation at all—solely because of a possibility that the laws of some other state might in the future be applied in conflict with this application of Wisconsin's law. The court conceded that the "suggested confusion of state regulation does not appear presently to be a fact."[39] It speculated, however, that "there well may be a limit to the number of teams which can feasibly be included in a major league." The

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[38] State antitrust laws are a well-recognized exercise of the police power. See cases cited in footnote 18, *supra*.

[39] A decree ordering respondents to provide an expansion franchise to the Brewers or to the County would not conflict with any decree requiring the Braves to play in Atlanta. See *City of Atlanta* v. *Atlanta Braves, Inc.*, Civil No. B17638, Superior Court, Fulton County, Georgia; *City of Atlanta* v. *Houston Sports Assn.*, Civil No. 66-H-70, S.D. Tex.

court reasoned that "If Wisconsin can reach her problem by application of her antitrust statute, other states would have equal standing to apply other types of regulatory rules and procedures, involving different standards for decision." (R. 9494-95; App. 38a-39a). A potential for conflict—a large number of states seeking to force the award of a limited number of franchises—was the court's necessary hypothesis.

However, it was established in this case that some expansion of the major leagues (to include Milwaukee) was both feasible and desirable.[40] Milwaukee is a sound and proven baseball market which could be matched by few other cities. It is at present the second largest baseball market in the country without a major league franchise; and it is the only community which has been totally abandoned by the major leagues since 1903. Respondents, who had the burden of proof on the Commerce Clause issue, have wholly failed to establish that the major leagues cannot expand to serve the few cities which could support major league teams. Nor have they shown a likelihood that any other state would apply its law to compel expansion beyond the capability of the league or to require the location of a franchise in an untested and inadequate market. In short, respondents have failed to show even a potential conflict.

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[40] There are already 24 major league professional football teams with more in the offing. See S. Rep. No. 1654, 89th Cong., 2nd Sess. (1966). Insofar as the argument against expansion rests on an alleged shortage of skilled players, it should be noted that the 24 major league football teams have almost 1000 players on their active rosters, as compared to only 500 for the 20 major league baseball teams. If there is a shortage of skilled baseball players, it may well result from a long-term monopoly-created shortage of player job opportunities. Even major league hockey has announced plans to double the number of hockey franchises from 6 to 12. *New York Times*, Feb. 10, 1966, p. 1, col. 2.

But whether or not a potential for conflict appears on the face of this record, repeated decisions of this Court have established that the possibility of future conflict between state laws is not a ground for invalidating them under the Commerce Clause. *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 429 (1963) (statute regulating advertising of optometrical devices); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 721-22 (1963) (anti-discrimination law); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 448 (1960) (smoke control ordinance); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 523 (1947) (natural gas regulation). *Cf. Joseph E. Seagrams & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 46 (1966). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436, 448-49 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 462-63 (1959); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 295 (1944) (state "double taxation" cases). For example, in *Huron*, Detroit's smoke control ordinance was challenged on the ground that conflicting requirements might be imposed by other states. This Court held that this possibility of conflict was not ground for striking down the Detroit law. An actual conflict, as in *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959), not a potential conflict, must be shown.

In the remote event that the conflict feared by the court below should later ripen into an imminent or real one, that will be time enough to invoke the protection of the Commerce Clause. *Cf. Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 263 (1937) (Puerto Rico antitrust act). And, as this Court has emphasized in *Radovich*, 352 U.S., at 452, Congress also has authority under the Commerce Clause to afford relief if the alleged potential conflict should later materialize. Here, as in *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U.S. 280, 292 (1914):

> "If there is a conflict in . . . local regulations, by which interstate commerce may be inconvenienced . . . there

> is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient."

In summary, the decision of the court below is inconsistent with decisions of this Court holding potential conflict to be irrelevant, and, calls for review by this Court on writ of certiorari.[41]

CONCLUSION

This is one of those rare cases in which a state seeks certiorari to overturn a decision of its state supreme court striking down the application of state legislation on federal grounds. This Court should grant certiorari to correct the manifest error of the Wisconsin Supreme Court; "in order to clarify the application of the *Toolson* doctrine . . ." (*Radovich*, 352 U.S., at 447); and to correct a decision on the Commerce Clause issue which threatens the states'

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[41] For reasons which do not appear, the Wisconsin Supreme Court apparently held that enforcement of $5,000 statutory forfeitures against each respondent club, like the relief of an expansion franchise, would unduly interfere with interstate commerce. However, the award of the penalties does not create even a possibility of conflict among the states nor does it require the respondents to alter their operations in any respect whatsoever. In holding that the Commerce Clause is a barrier to this relief, the decision of the court below is clearly in error.

important powers to apply their antitrust laws to businesses with interstate aspects.

Respectfully submitted,

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